

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6592

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

CHARLES MICHAEL COON, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, District Judge. (CR-03-148; CA-05-121-3)

Submitted: August 30, 2006

Decided: November 14, 2006

Before WILKINSON, MOTZ, and GREGORY, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Charles Michael Coon, Jr., Appellant Pro Se. Amy Elizabeth Ray, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Charles Michael Coon, Jr., appeals the district court's order summarily dismissing a 28 U.S.C. § 2255 (2000) motion to vacate his 2003 convictions on various drug offenses. We previously granted a certificate of appealability on Coon's claim that his attorney failed to appeal these criminal convictions despite Coon's request that he do so.* For the reasons that follow, we vacate the district court's order summarily denying relief on this claim, and remand for further proceedings.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255. A hearing is required when a movant presents a colorable Sixth Amendment claim showing disputed material facts and a credibility determination is necessary to resolve the issue. See United States v. Witherspoon, 231 F.3d 923, 925-27 (4th Cir. 2000); Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000); United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993).

In its informal brief to this court, the Government concedes that "the record before the district court raised a

*In the same order, we denied a certificate of appealability and dismissed Coon's appeal with respect to his other claim of ineffective assistance of counsel.

genuine issue of material fact as to whether trial counsel's performance was *per se* ineffective under Peak. Accordingly, the district court's summary dismissal of this claim without seeking an affidavit from trial counsel or resolving the dispute was in error." We agree. In light of Coon's claim, under penalty of perjury, that counsel failed to file an appeal after being requested to do so, we find that the district court erred in summarily dismissing this claim of ineffective assistance of counsel. Accordingly, we grant the Government's motion for leave to file its brief out of time, vacate the decision of the district court, and remand the case for further proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED